David Lim Hong Kee v Perwira Affin Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO S–03–54 OF 1998
MOKHTAR SIDIN, MOHD NOOR AHMAD AND MOHD GHAZALI JJCA
22 JULY 2003

Civil Procedure — Service — Substituted service — Bankruptcy notice published by advertisement in newspaper but actual bankruptcy notice not published in advertisement — Whether substituted service followed format in Form 15 of appendix to Bankruptcy Rules 1969 — Bankruptcy Rules 1969, Form 15 to the appendix

A bankruptcy notice was issued against the appellant. As the bankruptcy notice could not be served personally on the appellant, the respondent obtained an order for substituted service. It was ordered that the bankruptcy notice be served and effected by advertisement in one issue of the *Daily Express* in the English language. The publication was duly made in the *Daily Express* on 18February 1998. The appellant filed an application by way of summons in chambers and applied for an order that the bankruptcy notice be set aside on the following, inter alia, that the actual bankruptcy notice and the contents therein were not published at all and were not included in the advertisement and therefore no act of bankruptcy was committed by the appellant. Therespondent contended that the substituted service was proper as it was taken up in accordance of the order of the court and followed the format laid down in Form 15 of the appendix to the Bankruptcy Rules 1969 ('the Rules'). The appellant appealed to the High Court and the judge held that Form 15 was complied with. The appellant appealed.

Held, dismissing the appeal:

The court ordered for the bankruptcy notice to be served on the appellant and effected by advertisement in the *Daily Express* and that such service shall be deemed good and sufficient service of the bankruptcy notice on him. The form of the advertisement followed the format in Form 15. It was also stated in the advertisement that the bankruptcy notice can be inspected by the appellant on application to the court. The method employed to effect the substituted service was not inconsistent with the order of the court. It was sufficient to bring knowledge of the bankruptcy notice to the appellant; *North Borneo Trading Co (B) Sdn Bhd v Henry Wong Tan Fook* [1982] 1 MLJ 147 followed (see para 11).

[**Bahasa Malaysia summary**

Satu notis kebankrapan telah dikeluarkan terhadap perayu. Memandangkan notis itu tidak dapat disampaikan ke atas perayu, responden telah memohon untuk perintah penyampaian ganti. Ia telah diperintahkan bahawa notis kebankrapan itu disampaikan dan dilaksanakan oleh iklan di dalam satu isu *Daily Express* di dalam Bahasa Inggeris. Penyiaran itu telah dibuat di dalam *Daily Express* pada 18 Februari 1998. Perayu memfailkan permohonan melalui saman dalam kamar dan memohon perintah bahawa notis kebankrapan itu diketepikan di atas alasan-alasan berikut, antara lain, notis kebankrapan dan

kandungannya tidak disiarkan dan tidak dimasukkan ke dalam iklan dan oleh itu perayu tidak melakukan perbuatan kebankrapan. Responden menyatakan bahawa penyampaian ganti adalah betul kerana ia dibuat menurut perintah mahkamah dan format yang diperuntukkan di dalam Borang 15 lampiran kepada Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah itu'). Perayu telah merayu kepada Mahkamah Tinggi dan hakim memutuskan bahawa Borang 15 telah diikut. Perayu merayu.

Diputuskan, menolak rayuan itu:

Mahkamah memerintah bahawa notis kebankrapan disampaikan ke atas perayu dan dilaksanakan melalui iklan di dalam *Daily Express* dan bahawa penyampaian seperti itu adalah baik dan memadai. Iklan itu juga mengikut format di dalam Borang 15. Ia juga dikatakan di dalam iklan bahawa notis kebankrapan itu dapat diteliti melalui permohonan ke mahkamah. Cara yang digunakan untuk melaksanakan penyampaian ganti itu adalah konsisten dengan perintah mahkamah. Ia memadai memberi pengetahuan mengenai notis kebankrapan kepada perayu; *North Borneo Trading Co (B) Sdn Bhd v Henry Wong Tan Fook* [1982] 1 MLJ 147 diikut (lihat perenggan 11).]

Notes

For cases on substituted service, see 2 *Mallal's Digest* (4th Ed 2001 Reissue) paras 5328-5346.

Cases referred to

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)
North Borneo Trading Co (B) Sdn Bhd v Henry Wong Tan Fook [1982] 1 MLJ 147 (folld)

Legislation referred to

Bankruptcy Rules 1969 rr 97, 110, Form 15 of the appendix

Appeal from: Kebankrapan No T(29)-249 tahun 1997 (High Court, Tawau)

CY Ngeow (Loke & Associates) for the appellant
WM Cheng (Raja, Darryl & Loh) for the respondent

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge who dismissed the appellant's application to set aside the bankruptcy notice served by substituted service.

[2] On 28 November 1997, on the application of the respondent, a bankruptcy notice was issued against the appellant. As the bankruptcy notice could not be served personally on the appellant, the respondent, on 10 February 1998, obtained an order for substituted service from the senior assistant registrar of the High Court at Tawau. It is ordered therein that the bankruptcy notice

on the appellant 'be served and effected by advertisement in one issue of the *Daily Express* in the English language and such service shall be deemed good and sufficient service of the bankruptcy notice on the judgment debtor'. The publication of the notice of substituted service was duly made in the *Daily Express* on 18 February 1998.

[3] On 26 May 1998 the appellant filed an application by way of summons in chambers wherein he applied for an order that the bankruptcy notice be set aside on the following grounds:

(a) the actual bankruptcy notice and the contents therein were not published at all and were not included in the advertisement;

(b) for the reason given in para (a), there was, in fact, no actual service of the bankruptcy notice by advertisement; and

(c) since the advertisement did not contain the bankruptcy notice, the advertisement was ineffective and therefore no act of bankruptcy was committed by the appellant.

[4] In opposing the application, the respondent contended that the substituted service in the form of the advertisement in the Daily *Express* on 18 February 1998 was proper as it was taken up in accordance of the order of the court and followed the format laid down in Form 15 of the appendix to the Bankruptcy Rules 1969 ('the Rules').

[5] On 29 June 1998, the appellant's application was dismissed with costs by the learned judge on the grounds that 'it is sufficient that Form 15 be substantially complied with in effecting the substituted service' and that 'it is not necessary to advertise the bankruptcy notice itself'. The learned judge was also of the view that 'as per the manner of effecting the service it is within the discretion of the court to direct the manner of its publication' and in relation to this referred to *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263.

[6] Against that decision the appellant appealed to this court. We dismissed the appeal and we now give our reasons. The advertisement as appearing in the *Daily Express*, infer alia, reads:

SUBSTITUTED SERVICE OF BANKRUPTCY NOTICE

IN THE MATTER OF bankruptcy notice issued on the 28th day of November 1997.

To: David Lim Hong Kee

late of Bombalai Single

Quarterhouse

Tawau

TAKE NOTICE that a bankruptcy notice has been issued against you in this court by the abovenamed judgment creditor, PERWIRA AFFIN BANK BHD (formerly known as PERWIRA HABIB BANK MALAYSIA BHD) of 3rd Floor, Wisma SPK, Jalan Sultan Ismail, P O Box 10459, 50915 Kuala Lumpur, Malaysia

and the court has ordered that the bankruptcy notice be served on you by the publication of this notice and such service shall be deemed to be good and sufficient service of the bankruptcy notice upon you.

The bankruptcy notice can be inspected by you on application to this court.

Dated the 10th day of February 1998.

SENIOR ASSISTANT

REGISTRAR

HIGH COURT IN

SABAH AND SARAWAK

TAWAU.

[7] What is clear is that what was published above was in the format of Form 15 of the rules. In relation to Form 15, r 97 of the rules reads:

A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

[8] In relation to the same, r 110 of the rules reads:

(1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

(2) Where any such order has been carried out the petition shall be deemed to have been duly served on the debtor.

[9] The appellant has applied to set aside the bankruptcy notice on the grounds that the actual bankruptcy notice and its contents were not published and were not included in the advertisement and hence, there was no actual service of the bankruptcy notice by advertisement and that being the situation, the advertisement was ineffective and therefore no act of bankruptcy was committed by him. In *Low Mun v Chung Khiaw Bank Ltd* the debtor challenged, infer alia, the service of the bankruptcy notice effected by way of substituted service on him. The Supreme Court was of the view that under r 110 read together with r 97 of the Rules, the Bankruptcy Court has a wide discretion to order the manner in which the substituted service could be effected. Having considered the evidence the Supreme Court was of the view that the substituted service had sufficiently complied with Form 15 of the Rules, and since personal service could not be effected, it is not a wrong exercise of discretion for the court electing not to include in the order, posting of the notice at the last known address of the debtor. At p 264, Mohamed Azmi SCJ said:

We are not persuaded that the order for the substituted service in the present case was defective. Form 15 of the Bankruptcy Rules had been substantially complied with and whatever deviation from the prescribed Form is covered by section 62 of the Interpretation Act 1967.

[10] In *North Borneo Trading Co (B) Sdn Bhd v Henry Wong Tan Fook* [1982] 1 MLJ 147 the appellant obtained an order for substituted service which stated that the bankruptcy notice shall be published in a newspaper and in the Government Gazette. The notice published was in conformity with Form 15 but the actual bankruptcy notice was not published. The respondent contended that service was irregular as the actual bankruptcy notice was not published. This appellant in the instant case has canvassed the same contention. In delivering the judgment of the Federal Court, Abdul Hamid FJ (as he then was) said (at p 149):

> The central issue here is what constitutes sufficient service of the bankruptcy notice when effected by way of substituted service. In this regard two elements must be considered - (a) the term of the order and (b) the form to be used.
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> Looking at the order it may appear that it is the term of the order that the bankruptcy notice itself be published but what we also have to consider is whether the term of the order could be satisfied by causing the publications to be made in a manner in conformity with the form provided.
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> The rule provides a certain form to be used when effecting service of the bankruptcy notice by way of substituted service and that form is Form 15.
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> The question is whether by using the form provided sufficient service of the bankruptcy notice could be effected. In this respect we bear in mind that the method of substituted service should, in all reasonable probability, if not certainty, be effected to bring knowledge of the bankruptcy notice or the notice of the bankruptcy notice to the debtor. (See *Porter v Freudenberg* [1915] 1 KB 857, at p 889); (see also *Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126).
>
> In the instant case, the publication was made to conform with Form 15 as provided in the Appendix. The question that calls for consideration is whether such publication was sufficient and regular. To answer the question it is necessary to determine whether the publication produced the desired effect, namely, that it brought to the knowledge of the debtor the bankruptcy notice.
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> It may be appropriate to note that BR4 which provides for the use of Form 15 states -
>
> > 4 The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used ... .
>
> The form applicable to BR97 and BR110(2) is Form 15 and it is not in dispute that the publication both in the *Sarawak Tribune* and the *Sarawak Government Gazette* was in conformity with Form 15. The main complaint is that the bankruptcy notice itself was not published. We see no merit in the argument for reason that the method employed to effect the substituted service was not, in our view, inconsistent with the term prescribed by the order. It was clearly set out in the publication that the bankruptcy notice had been issued in the High Court at Kuching, and that the bankruptcy notice could be inspected by the debtor at the court. This was sufficient, in our view, to bring knowledge of the bankruptcy notice or notice of the bankruptcy notice to the debtor. In consideration we see no irregularity whatever indeed we find that the publication did produce the desired effect. In our judgment the bankruptcy notice was duly served on the debtor.

[11] In the instant case, it is the order of the court that the bankruptcy notice on the appellant be served and effected by advertisement in the *Daily Express* and that such service shall be deemed good and sufficient service of the bankruptcy notice on him. The form of the advertisement followed the format in Form 15. It was also stated in the advertisement that the bankruptcy notice can be inspected by the appellant on application to the court. The method employed to effect the substituted service was not inconsistent with the order of the court. It was sufficient to bring knowledge of the bankruptcy notice to the appellant. We cannot find any merit in the argument canvassed by the appellant that the actual bankruptcy notice must itself be published following the views of the Federal Court in *North Borneo Trading Co (B) Sdn Bhd v Henry Wong Tan Fook*.

[12] For these reasons, we dismissed this appeal with costs and ordered that the deposit be paid to the respondent towards the account of taxed costs.

Appeal dismissed.

Reported by Chew Phye Ken